In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 953

JAMES NORMAN YELOUSHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 313 F. 2d 303.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on February 6, 1963. A petition for rehearing (Pet. App. C) was denied on March 1, 1963. The petition for a writ of certiorari was filed on March 28, 1963. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

682732—63

QUESTION PRESENTED

The district court denied petitioner's motions to require the United States Attorney for the Southern District of Florida to withdraw his consent to the Rule 20 transfer of the proceedings against petitioner's codefendant, or in the alternative to order the arrest of petitioner's codefendant. The question is whether these orders of the district court were appealable as final decisions within the meaning of 28 U.S.C. 1291.

STATEMENT

On November 21, 1961, an indictment was returned in the United States District Court for the Southern District of Florida charging petitioner and Gene N. Estes with violating 18 U.S.C. 1010 by uttering and publishing false statements in an application for a loan insured by the Federal Housing Administration (R. 1–2).[1] Petitioner was arrested in Florida; Estes

[1] According to the petitioner, Estes, a native of Midland, Texas, who came to Tampa, Florida, with his wife and four children in 1960, wished to purchase a house from petitioner but did not have the $3,000 in cash required for the down payment. It is petitioner's contention that Estes told him that he had the $3,000 but that he would prefer to use it to make some improvements on the house. Estes' version of the transaction is that petitioner suggested that he obtain the money required for the down payment through an FHA insured home improvement loan. Estes made application for a home improvement loan at the First Federal Savings and Loan Association in Tampa, specifying in detail the improvements that were to be made (R. 75). Instead of using the money as he had indicated, Estes gave petitioner the proceeds of the loan as the down payment for the house (R. 38). In December of 1960, Estes defaulted on the loan and returned to Midland, Texas.

in Texas. Estes waived his right to trial in the district where the indictment was returned and consented to disposition of the case against him in the district where he was arrested under the provisions of Rule 20, F.R. Crim. P. (R. 3, 89–90). The United States Attorney for the Southern District of Florida and the United States Attorney for the Western District of Texas approved the transfer. Estes was arraigned, entered a plea of guilty and was sentenced on February 16, 1962, at El Paso, Texas (R. 97–117). Petitioner was arraigned on January 5, 1962, at Tampa, where he entered a plea of not guilty (R. 85–88). Later petitioner filed successive pre-trial motions requesting the district court to require the United States Attorney for the Southern District of Florida to withdraw his consent to the Rule 20 transfer, to dismiss the indictment against petitioner, or to order the re-arrest of Estes (R. 20, 22, 64).

The district court denied the motions, and petitioner appealed each denial. The appeals were consolidated by the court of appeals, which then dismissed them on the ground that the orders were not "final decisions" within the meaning of 28 U.S.C. 1291 (R. 161–167).

ARGUMENT

The orders of the district court from which petitioner has appealed were not appealable since the jurisdiction of the court of appeals is limited by 28 U.S.C. 1291 to a review of "final decisions" and the interlocutory orders involved in this case do not fall within any exception to this "final decision" rule. *DiBella* v. *United States,* 369 U.S. 121; *Carroll* v.

United States, 354 U.S. 394; *Cogan* v. *United States*, 278 U.S. 221.

What constitutes a final decision is well settled. In *Parr* v. *United States*, 351 U.S. 513, 518, this Court stated, "Final judgment in a criminal case means sentence." Petitioner's case has not yet gone to trial. Obviously there has been no "final decision."

Petitioner argues, however, that the damage caused by failure to review the district court's orders before final judgment is so great as to offset the disruption caused by an immediate appeal and that his case is, therefore, to be treated as an exception to the "final decision" rule. This contention has no substance. Petitioner's position is the same whether Estes pleaded guilty in Florida or whether he pleaded guilty in Texas. Clearly if the former were the case, petitioner could not claim that the denial of his motions for a dismissal was appealable before final judgment. The situation is not changed by Estes' presence in Texas rather than Florida.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

APRIL 1963.

U. S. GOVERNMENT PRINTING OFFICE: 1963